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Supreme Court of the United States

October Term, 1948

No. 591

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY,
PETITIONER,

versus

FEDERAL POWER COMMISSION AND SOUTH CAROLINA ELECTRIC & GAS COMPANY.

BRIEF IN OPPOSITION TO CERTIORARI ON BEHALF OF INTERVENER SOUTH CAROLINA ELECTRIC & GAS COMPANY

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STATEMENT

History of Proceedings Below

South Carolina Electric & Gas Company, later referred to as Electric & Gas, was formerly an operating company in the Associated Gas and Electric System. Following the bankeruptcy of that system the common stock of Electric & Gas was vested in General Public Utilities Corporation of New York and, in compliance with orders of the S. E. C., was distributed as a dividend by that Corporation

in November, 1946. As a result, Electric & Gas then had approximately thirty-seven thousand stockholders, widely scattered throughout the country. A board of directors was then elected, consisting entirely of citizens and residents of South Carolina living in its service area. The directors not connected with the company are successful and respected business men of their respective communities. It is an entirely independent, privately owned utility company. Prior to its acquisition of the stock of South Carolina Power Company, later referred to as Power Company, there was absolutely no connection between it and any holding company or other utility. There is no one stockholder or group of stockholders owning enough of the common stock to control the company (R. 184-185, 205-206).

Electric & Gas introduced as Exhibit 22 before the state commission a map published by the state commission showing transmission lines in South Carolina. This is colored in green covering the territory served by Electric & Gas and in purple covering the territory served by Power Company, with the transmission lines in both territories emphasized in red. This map shows at a glance various physical facts leading to the conclusion that the then proposed integration between the two companies was a "natural," just as the Authority claimed that the proposed integration between it and Power Company would be. The map shows that the service area of Electric & Gas extends into ten, and that of Power Company into fourteen counties. At the time that the Authority was created in 1934 and prior thereto and since the two companies have together been serving twenty-four out of the total of forty-six counties of South Carolina.

Electric & Gas has its principal office in the capital City of Columbia and Power Company has its in the City of Charleston. Both are subject to the jurisdiction of the state

commission under the comprehensive regulatory statute adopted in South Carolina in 1932, which is now codified as sections 8555-1 to 8555-8 of the Code of South Carolina of 1942. Both are also subject to the jurisdiction of the F. P. C. under the Federal Power Act of 1935, 16 U. S. C. A. 791 *et seq.*

Electric & Gas first secured authority from the state commission to issue the securities to raise the money to pay for the stock, as required by the regulatory act of 1932, as the result of a proceeding in November-December, 1947. The Mayor and the City of Charleston, and the state Senator from and the County of Charleston (later called the Charleston Group) intervened as protestants before the state commission, as did the Authority and others. The Charleston Group and the Authority took an active and vigorous part throughout the proceeding. The state commission sat for eight days; 39 witnesses were sworn, making a transcript of some 1195 pages, and some 45 exhibits were introduced. The state commission issued its order No. E-578 on December 23, 1947, confirming its original order No. E-576, which approved the application of Electric & Gas (R. 259).

On the first day of this hearing the commission ruled: "All of the evidence which the protestants desire to present bearing on that question of public interest, tending to show that the passage of this order approving the issuance of these securities is against the public interest will be gladly heard and considered by the Commission." (Stenographer's Transcript, Vol. 1, dated December 2, 1947, page 20.) This attitude resulted in such a complete hearing that the evidence there taken was by agreement of counsel accepted as part of the record of both the S. E. C. and the F. P. C. Additional testimony was taken before the S. E. C., but not before the F. P. C.

The Charleston Group next brought an action in the Court of Common Pleas for Richland County, South Carolina, to review the orders of the state commission, as provided for in the aforesaid regulatory act, which was heard February 27, 1948. The court heard extensive oral arguments, called for two sets of briefs, and on April 3, 1948, affirmed the orders both on the law and the facts and dismissed the complaint, with a well-considered opinion. (R. 263-271.) An appeal noted to the Supreme Court of South Carolina by the Charleston Group was dismissed without their objection on May 14, 1948, and the decree of the state court then became final.

Neither Commonwealth nor Power Company was a party to the proceeding before the state commission or court. The Authority was not a party to the court proceeding.

Next in time, the S. E. C. issued an order on March 25, 1948, authorizing Commonwealth to sell the stock of Power Company to Electric & Gas. (R. 74-101.) This order was subject to rule U-24, which required that the transaction authorized should be carried out within sixty days from the date of the order. The sixty days expired on May 24, 1948. The stock was sold and delivered on May 18, 1948. (R. 306.) The Charleston Group and the Authority intervened as protestants before the S. E. C., but the Authority alone petitioned the Court of Appeals for a review of the order of the S. E. C.

Next in time, the F. P. C. issued an order on April 29, 1948, permitting Electric & Gas to buy the stock from Commonwealth. This carried an express condition reading: "This authorization shall expire unless acted upon within sixty days after the entry of this order"—which made the expiration date June 28, 1948. (R. 2, 10.) Commonwealth was not a party to this proceeding, but the Charleston

Group and the Authority intervened as protestants therein, although the Authority alone filed a petition for a review of this order (No. 5793) in the Court of Appeals.

The Facts as to the Closing

Electric & Gas found itself in the following situation when the F. P. C. order came down on April 29, 1948. The stock purchase contract was dated October 28, 1947, and the original closing date was January 6, 1948. Pursuant to section 1, Electric & Gas had made a deposit of a half-million dollars as earnest money. The contract was, of course, conditioned on requisite approvals, and the closing date was necessarily extended by mutual agreement five times—the last time until May 31, 1948—awaiting the decisions of the two Federal Commissions. The order of the S. E. C. issued March 25, 1948, and the time limit of sixty days thereunder expired May 24, 1948. The S. E. C. had said: "Commonwealth has requested that the order of the Commission with respect to the proposals before us become effective immediately in order that the sale may be consummated expeditiously. We deem it appropriate to grant this request." (R. 96-97.) The S. E. C. had denied the Authority's petition for rehearing on April 16, 1948.

Commonwealth was in urgent need of the $10,200,000.00 to relieve a cash stringency on account of the construction program of two operating subsidiaries in Georgia and Alabama. This was recognized by the S. E. C. (R. 92), and Commonwealth intended to and did apply the funds to that purpose (par. 7, Whiting affidavit, R. 310).

Commonwealth insisted on performance because it needed the money. The underwriters reported that it was a good time to sell the securities. Counsel for the various interested parties advised their respective clients that the transaction could be lawfully consummated. Electric & Gas

considered the proposition a beneficial one for its stockholders and the customers of Electric & Gas and Power Company and was faced with the loss of this opportunity and question as to its earnest money if it did not proceed. It was in this setting and in these circumstances that Electric & Gas decided to close.

The Costello and Whiting affidavits (R. 300-311) show that some 6,500 private investors throughout the country and four banks, as well as Electric & Gas and Commonwealth, and others dealing with the latter have substantially changed their financial position and status and that this cannot be restored without prejudice. All acted in good faith and in reliance on the simple and unambiguous orders of the two Federal Commissions, which were in turn based on the clear and simple authorization of the Congress.

If the parties had not acted when they did, but had decided to await the expiration of the appeal period and if two Federal Commissions had extended their orders indefinitely, they would be waiting today, after the passage of more than sixteen months since the execution of the contract. No responsible and experienced party would enter into a contract of this character with the performance thereof so uncertain as to time and cast so far into the future.

The negotiations between Commonwealth and the Authority were res inter alios acta as to Electric & Gas.

The Federal Works Agency filed its petition for intervention with the F.P.C. on April 26, 1948, and suggested that the F.P.C. inquire whether there existed an understanding between Electric & Gas and Commonwealth and others to restrict the sale of electric energy and prevent competition therein in violation of law. The F.P.C. referred to this petition in its statement (R. 6) and later posed the suggestion, and in answer thereto said: "• • •

we find no evidence in the record before us which would warrant such further investigation. * * *" (R. 8.)

Notwithstanding this finding, and notwithstanding that the Agency did not join in the petition for review below, the Authority saw fit to charge, on page 3 of its brief below, that the F.P.C. erred in failing to make findings on the facts of "the restrictive and illegal conditions sought to be imposed by Commonwealth upon the Authority and the probability that such conditions were implicit in the arrangements between Commonwealth and Electric & Gas." And on page 21 of its brief the Authority asserted "the strong inference that Electric & Gas has reached with Commonwealth illegal and contra-public policy agreements relating to the limiting of competition and the use of public power generated at Clark's Hill."

Electric & Gas was not a party to and did not participate in any way or to any extent in the negotiations between Commonwealth and the Authority. Electric & Gas attended strictly to its own business in this transaction, as it tries to do in all matters. There is not a scintilla of evidence in the record that there was any secret agreement or collusion between Electric & Gas and Commonwealth in this respect, or any other. There was none in fact. The brief made no supporting reference to any such evidence. It was a baseless charge that might well have been omitted. The court below did not dignify it by making reference thereto.

The Creech Case, 200 S. C. 127, 20 S. E. (2) 645

Petitioner's statement (page 8) quotes subdivisions (7) and (8) of the Authority's enabling act of 1934, which is printed commencing at R. 111. This Court might reasonably draw the inference from what is said by petitioner that the *Creech case* turned on a construction of these two

subdivisions standing alone. This is not so. The act printed is taken from the Code of 1942, wherein the sections carry numbers that are different from their numbers in the original act. Section 3 of the act is numbered as section 8555-13 of the Code (R. 113). This section first carries a general grant, as follows:

> "8555-13. Powers.—The public service authority shall have power to develop the Cooper River, the Santee River, and the Congaree River in this State, as instrumentalities of intrastate, interstate and foreign commerce and navigation; to produce, distribute and sell electric power; to reclaim and drain swampy and flooded lands; and to reforest the water sheds of rivers in this State; and shall also have all powers which may be necessary or convenient for the exercise of such powers, including, without limiting the generality of the foregoing, the following powers: * * *." (R. 113.)

Then follow twenty-one subdivisions, among which are found subdivisions (7) and (8) quoted on page 8 of the petition.

The Supreme Court of South Carolina first quoted the general grant of power from section 3 of the enabling Act (now section 8555-13 of the Code) and held that there was nothing in this general grant of power which authorized the Authority to purchase the completed and operating public utilities in question—that the purport of the general grant was governed and controlled by the word "develop." 200 S. C. at 139, 20 S. E. (2) at 649. The Court then quoted several subdivisions of section 3, including (7) and (8). It specifically denied that subdivision (7) authorized the purchase of fully developed public utility businesses serving great areas of the State, and said further concerning it:

> "* * * The words in their natural context and in their relation to the whole Act are reasonably refer-

able and conclusively so we think, to the power to develop and construct by bringing into being new facilities, rather than the power to buy or acquire great power plants long since engaged in the production of electric energy. It was never the intention of the Legislature, as we gather from the whole Act, that the Authority should be given the power to buy an existing utility system in order to produce, distribute and sell electric power. The significance and meaning of the word 'develop' is easily discernible in the structure of the entire statute.

"Subdivisions 8 and 20 of Section 3 have no relation to the acquisition of electric utilities. They deal solely with the dominant purpose of the Act, that is, the development of the natural resources of the State." 200 S. C. at 141, 142, 20 S. E. (2) at 650.

The court then quoted from section 5 of the act (now section 8555-16 of the Code—R. 123-124), and later quoted from section 7 (now section 8555-18 of the Code—R. 125) in support of its holding that the Authority was created for the primary purpose of developing and conserving the natural resources of the State within territorial limits and had no power to purchase existing completed and operating utility companies, irrespective of their geographical location in the State. 200 S. C. at 144, 20 S. E. (2) at 651.

The court made it as clear as the English language permits that there was a complete absence of power to purchase a completed and operating utility and hence the court did not rely on the limitation in subdivision 21 of section 3 of the act (section 8555-13 of the Code—R. 116) as a limitation on such power. It held that this limitation (on the power of the Authority to study and consider all undeveloped power sites and navigation projects in the State and to acquire and/or develop the same) did not enlarge such general grant of power found in the opening paragraph of section 3 of the act (section 8555-13 of the Code—

R. 113). The court considered the somewhat similar proviso to section 5 of the act (section 8555-16 of the Code—R. 124) in connection with its consideration of subdivision 21, so that this holding covered that section also. 200 S. C. at 142 *et seq.*, 20 S. E. (2) at 650 *et seq.*

This holding is crystal clear that the Authority has no power to purchase a completed and operating electric utility, irrespective of its location. The court below was right.

We can add nothing to what the court below said with reference to the order on the petition for rehearing in the *Creech case* (R. 329).

The contract considered in the *Creech case* was one whereby the Authority undertook to acquire the securities of Electric & Gas and its former associate company, Lexington Water Power Company, which has since been consolidated with Electric & Gas. Power Company is likewise a completed and operating electric utility and had been such for years when the Authority was created in 1934. The Authority has no more power to buy the stock of Power Company now than it had to buy the stock of Electric & Gas and Lexington in 1942.

The second ratio decidendi of the Creech Case.

The Supreme Court of South Carolina further specifically denied, as an equally primary ground of its decision, that the Authority had the power to purchase or own or operate a gas production and distribution system or a bus transportation system, such as were owned and operated by Electric & Gas in the City of Columbia and its environs. The petition here states the indisputable fact that Power Company "is also engaged in the manufacture and sale of gas and in rendering bus transportation service in

Charleston and nearby communities" (page 5). Charleston is a larger city than Columbia and the gas and transportation properties now owned and operated by Power Company are comparable in size and value with those owned and operated by Electric & Gas in and around the City of Columbia in 1942. In this respect, the Supreme Court of South Carolina held:

> "Nowhere in the enabling Act is authority conferred upon the defendants to engage in the production and sale of gas and to own a bus line and operate a system of transportation in the City of Columbia. These properties are valued at over two million dollars, but the defendants argue that their inclusion in the proposed purchase is merely temporary or incidental, and represents no substantial part of the regular permanent business of the utility companies in question. We are unable to share this view. In the first place the production, distribution and sale of gas in the cities of Columbia, Florence and Darlington and the furnishing of bus transportation to the large and expanding City of Columbia and nearby Fort Jackson, cannot reasonably be regarded incidental to the business carried on by the Gas and Electric Company. In the second place, the charter of a corporation is a measure of its powers; and an enumeration of these powers implies an exclusion of all others. The power to purchase gas plants and to buy and operate a large bus transportation business is not bestowed by the statute, and is contrary to its general purpose, which is the development and conservation of the natural resources of the State within territorial limits." 200 S. C. at 145, 20 S. E. (2) at 652.

The court below evidently found the first *ratio decidendi* so clear and conclusive that it did not deem it necessary to refer to this one.

Public Interest Considerations

1. Electric & Gas recognizes that neither it nor Power Company can produce hydro-electric energy from their several hydro plants as cheaply as the Authority can, taking investment, interest charges and taxes into consideration. The petition states (p. 5) that the investment in Authority's hydro plant at Pinopolis, commonly referred to as Santee-Cooper, is $60,000,000.00. The intervention petition of the Federal Works Agency states that it holds the obligations of the Authority to the amount of approximately $29,000,000.00, and shows that the remaining $31,000,000.00 consisted of grants through the W.P.A. and P.W.A. The interest rate on the Authority's obligations held by the F.W.A. has been reduced to 2%. The Authority is, of course, exempt from many heavy state and federal taxes, which privately owned utilities must pay.

Electric & Gas has not sought to inject the question of public power versus private power into this proceeding. This injection has been the effort of the Authority and the Federal Works Agency. Although faced with the threat of destructive competition, boldly and deliberately announced by the Authority before the state commission (R. 47), Electric & Gas had and now has nothing to say on this political question because it does not deem it to have any bearing on the merits of this controversy.

2. On pages 12-13 of the petition under 2 the Authority lists the determining circumstances as (a) generating capacity and (b) financial position, and under 3 (pages 14-16) it adds (a) adequacy of power supply and (b) rates.

The state commission said:

> "The principal issues presented by the evidence and the arguments are: (1) as to the financial strength of the purchasing company or of the companies under

combined ownership; (2) as to the adequacy of the power supply and generating capacity of the companies under combined ownership; and (3) as to whether as a condition to the acquisition of the stock of the South Carolina Power Company, the South Carolina Electric and Gas Company should be required to provide for a rate reduction by the South Carolina Power Company." (R. 260.)

These fairly cover the items listed by the Authority. There were only three witnesses who testified from knowledge based on experience in utility construction, operation, management and financing. The first was Mr. Walter C. Herbert, who had been with the electrical utilities division of the state commission since 1932 and director thereof since 1939, and who was examined and cross examined at length by various counsel. The important portions of his testimony are printed in R. 151-174 and 177-181.

The second material witness was Mr. S. C. McMeekin, president of Electric & Gas, who was examined and cross examined at length. The whole of his direct testimony and the whole of his cross examination by Senator Jefferies, appearing for the Authority, is printed in R. 181-247.

The third material witness was Mr. J. M. Costello, vice-president in charge of finance for Electric & Gas, who was likewise examined and cross examined. Excerpts from his testimony are printed in R. 174-177, 247-257.

The only witness sworn by the Authority was Mr. J. H. Hammond, chairman of its board of directors, who read a prepared statement which is printed in R. 33-56. But this does not include his cross examination by various counsel (Transcript, IV, December 9, 1947, pp. 42-130). It appeared therefrom that the statement was prepared by the staff of the Authority and that Mr. Hammond had little or no personal knowledge of many factual assertions made

therein. The statement contains however little or no relevant or material evidence in respect of the issues under discussion. It is largely confined to a detailed account of the negotiations between the Authority and Commonwealth and the so-called offer as to what the Authority would do, together with the conditions that it requested the state commission to impose on Electric & Gas, if its petition should be granted.

The protestants relied almost entirely on various exhibits prepared by them, based on figures introduced and in the commission's records, together with protestants' conclusions and inferences therefrom. These were shown to be erroneous in many instances and otherwise were of little, if any, substantial value with reference to the factual issues presented. They can at most reasonably be said to have raised only minor issues of fact, all of which were determined in favor of Electric & Gas by the state commission, the state court and the F.P.C. Electric & Gas asserted and contended below, as it does here, that the testimony of Messrs. Herbert, McMeekin and Costello constituted substantial evidence to support the findings of fact by the F.P.C.

The order of the state commission dealt separately with each of the issues presented as quoted *supra,* as well as other questions. Its conclusion was thus stated:

> "On the whole, the Commission is of the opinion, and so finds from the evidence, that it would be, and is, in the public interest that the South Carolina Electric and Gas Company be authorized to issue the securities proposed in the petition for the acquisition of the stock of the South Carolina Power Company." (R. 259-262.)

The last paragraph of the well considered opinion of the able, experienced and respected state judge reads:

"I have in mind that section 8555-6(4) of the Code specifically provides that the burden of proof shall be on the plaintiffs in this action, and that apart from statute the rule is settled 'that the Commission's findings of fact are prima facie correct and should not be set aside unless clearly against the weight of the evidence.' *Southern Ry. Co. v. Commission,* 195 S. C. 247, at 256, 10 S. E. (2) 769. But notwithstanding this, I have considered the evidence as if it had been taken de novo in a suit tried before me in which I was to find the facts. And it is from this viewpoint that I find and hold that the findings of fact made by the Commission in its Orders E-576, E-578 and E-579 are sustained by the clear weight of the evidence and that all contentions made by plaintiffs based on the facts must be overruled and the Orders of the Commission affirmed." (R. 263-271.)

The order of the F.P.C. speaks for itself (R. 2-10), as does the unanimous opinion of the court below written by Chief Judge Parker (R. 325-330).

There are other factual assertions in 3 and 4, pages 14-16 of the petition, which were also made in petitioner's brief below and there answered in detail in the brief for Electric & Gas at pages 23-28. These were shown to be inaccurate, largely due to a misconception of the technical testimony by counsel for the Authority.

ARGUMENT

I

As to The Construction of Section 203(a) of The Federal Power Act

A. The Authority's Contention.

The practical effect of the Authority's contention throughout is that, by reason of section 203(a) of the

Federal Power Act (printed at page 33 of petitioner's brief; 16 U.S.C.A. 824-b(a)), Electric & Gas acquired no rights under its contract with Commonwealth; that, notwithstanding the contract, the F.P.C. should have denied the application of Electric & Gas because the Authority wished to purchase the stock and the acquisition thereof by the Authority was more in the public interest.

This is predicated on the assertion that acquisition by the Authority was and is immediately available as an alternative to acquisition by Electric & Gas. This assertion is in the teeth of the *Creech case.* But, taken for the moment at its face value, this contention of the Authority is *contra* the plain meaning of the simple language of section 203(a).

B. The Contention of Electric & Gas.

Electric & Gas had the right to buy the stock under the laws of South Carolina. The state court held: "* * * In so far as authority to purchase the stock from C. & S. was concerned, the Columbia Company needed no approval of the Commission. The Columbia Company had the statutory power to make the purchase under sections 7677 and 7745 of the Code. There is no inhibition against such a purchase in the Regulatory Act of 1932 (now section 8555 of the Code), and, if the Columbia Company had had the money to make the purchase from C. & S., it could have done so without approval of the Commission. * * *" (R. 265.) This legal proposition has never been disputed—even by the Authority.

Section 203(a) confirms the existing substantive right resulting to Electric & Gas from its contract with Commonwealth. This is sustained by the well reasoned opinion in *Pacific Power & Light Co. v. Federal Power Commission,* 98 F. (2d), 835, 837—affirmed 307 U. S., 156, 83 L. Ed., 1180. In that case the F.P.C. denied the application of Pacific

and its subsidiary Inland for approval of the transfer to Pacific of Inland's properties and assets under section 203 (a). The following is quoted from the opinion:

> "* * * We agree that the section conferred a substantive right to the Commission's approval, upon compliance with the showing required by the statute."

The F.P.C. had denied the application, and in that respect the court added:

> "Nor is there any merit in the contention that the denial merely places the petitioners in the same status as before applying for the order. On the contrary, if the petitioners' contention regarding consistency with the public interest be correct, before the order they were in possession of a right granted by Congress. After the order, they were deprived of it.
>
> "When such a claimed substantive right so definitely created by the Act is denied, the petitioner is a 'party aggrieved' within the specific provisions of s. 313(b). * * *"

In other words, Electric & Gas had, by reason of its contract, an absolute right under the laws of South Carolina, plus a substantive right to the F.P.C.'s approval under section 203(a), subject only to Electric & Gas showing that the purchase was consistent with the public interest.

If section 203(a) be construed as contended for by the Authority, this is *contra* the plain meaning of the simple language used and destroys the right that Electric & Gas had acquired under its contract with Commonwealth. The Authority contends in effect that when Electric & Gas applied to the F.P.C., and when the Authority intervened in opposition, they stood on an equal footing at the hearing; and this notwithstanding that Electric & Gas had a solemn contract with Commonwealth, that Commonwealth had rejected the Authority's offer and accepted the offer of Elec-

tric & Gas, that the state commission and court had approved the issuance of the securities because this had been proved to be in the public interest, and that the S.E.C. had authorized Commonwealth to carry out its contract and sell to Electric & Gas.

If the Authority's contention be sustained, this would wipe out the orders of the S. E. C. and the state commission and court, as well as the substantive contract right of Electric & Gas. On the other hand, the plain meaning of section 203(a) is merely that no such contract shall be recognized by the F.P.C. unless it be shown to be consistent with the public interest. The public is not entitled to reap a benefit from such a transaction; but the public is to suffer no prejudice as a result thereof. The construction in the *Pacific Power & Light case* preserves the constitutional right of freedom of contract and in the same breath guarantees against prejudice to the public. It is contrary to fundamental justice to void a contract right of even a privately owned public utility that does not prejudice the public.

II

Offers Not Binding on Authority

A. Offer to Buy Stock.

"Commonwealth rejects Authority's offer." This is the heading from page 7 of the petition. The rejection took place in October, 1947. More than sixteen months have elapsed. Can it be said that the Authority's expression of its desire and willingness to buy the stock at the higher price, which was expressed, as we understand the Authority's contention, before the three commissions in December, 1947, and in January, 1948, constituted a legal offer binding on the Authority for an indefinite time? The Authority has never offered to post any bond or earnest money or other

guarantee of performance. Its theory has always been that Commonwealth and Electric & Gas should bear the admitted risk. In other words, the Authority sought to enjoy a gamble at the risk and expense of others. This would be a pleasant adventure—but only from the Authority's viewpoint.

If the proceeding should be sent back to the Federal Commissions, when will this be, and when will the second round be finally ended, bearing in mind that there must be another decision secured from the Supreme Court of South Carolina? We do not undertake to answer this question.

If the two Federal Commissions should decide in the Authority's favor and the Supreme Court of South Carolina should reverse the *Creech case* and affirm the power of the Authority to buy, and if, during the appreciable length of time that all this will take, the existing economic recession or "dis-inflation" should ripen into a genuine depression, so that the Authority could not finance the purchase, or so that it would be absurd and ridiculous to proceed if it could do so, would the Authority nevertheless be bound?

If the Authority then failed to perform, could Commonwealthy secure a judgment for breach of contract against the Authority and enforce this against the property owned by the State, notwithstanding that the doctrine of equitable estoppel does not apply as against the sovereign State of South Carolina? *Carolina National Bank v. State of S. C.*, 60 S. C. 465, 38 S. E. 629.

Since it is conceded that the Authority's offer is conditioned on a favorable decision from the Supreme Court of South Carolina, all must admit—including counsel for the Authority—that consummation is pregnant with substantial doubt. And for the adventure to proceed to the point

that a court decision can be obtained the Authority must have a firm contract with Commonwealth. If Commonwealth was thus left to the tender mercy of the Authority, would the Authority comply with its offer to pay $11,600,000.00; or would the Authority offer $10,200,000.00, the price paid by Electric & Gas, or even less, and claim that this was a fair and equitable price?

We earnestly ask this Honorable Court to ponder the above suggested complexities and uncertainties from the practical and equitable as well as the legal viewpoint, and to bear in mind that before such an adventure can be launched the lawful contract between Commonwealth and Electric & Gas must have been rescinded (for no wrong chargeable to Electric & Gas) and the stock returned to Commonwealth. As we see such an operation, the result will prejudice many thousand innocent persons, and if the patient (Electric & Gas) recovers, it will be only after a long financial convalescence from a serious and unjust financial injury.

B. The Offer of a Ten Percent Rate Reduction.

The Authority asserted in its brief below (Note, p. 12) that "by the terms of the Act setting up the Authority the South Carolina Commission has no jurisdiction over it," citing section 8555-13(13) of the Code. (R. 114, 115.) This subdivision of the act of 1934 empowers the Authority to fix and determine its own rates, and we agree that to this extent the Authority is relieved from the jurisdiction of the state commission under the regulatory act of 1932. We do not agree that the Authority is relieved from the jurisdiction of the state commission in other respects; on the contrary, we assert and contend that the Authority is subject to the jurisdiction of the state commission, excepting only

as to the fixation of its rates. But this question is not pertinent here.

Section 201(f) of the Federal Power Act, 16 U.S.C.A. 824(f), relieves "any agency, authority or instrumentality" of any State from Subchapter II of that Act, which includes the power of the F.P.C. to fix rates. This exemption covers the Authority.

The result is that the Authority has the right and power to fix and determine its own rates. If, therefore, because of change in economic conditions, or for any reason satisfactory to it, the Authority should decide not to make a rate reduction, or, having made one, to raise the rates to the original level or even above that, the question would be presented as to what law or sanction could be invoked to require the Authority to perform its promise to reduce rates. We know of none.

III

The Moot Question

This Court will not consider a petition for *certiorari* based on a question that was decided in favor of petitioner below. (R. 330.)

CONCLUSION

The decision below was entirely on the merits according to the facts, rating the question concerning the effect of the decision in the *Creech case* as a fact in the case. The case involves unusual facts—so much so that it seems reasonable to prophesy that there will never be another like it.

There was no question of general interest decided against petitioner below.

It is respectfully submitted that the petition for *certiorari* should be denied.

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